

GARY ROBINSON,)	3:12-cv-00525-LRH (WGC)
)	
Plaintiff,)	<u>ORDER</u>
)	
vs.)	
)	
LUIS LANDA, et al.)	
)	
Defendants.)	

I. BACKGROUND

On September 27, 2012, Plaintiff filed his application for leave to proceed in forma pauperis and complaint. (Doc. # 1.) The case was assigned to United States District Judge Larry R. Hicks and the undersigned Magistrate Judge William G. Cobb. Because Plaintiff sought to proceed in forma pauperis, the court was required to screen his complaint pursuant to 28 U.S.C. § 1915(e)(2)(B), which provides that “the court shall dismiss the case at any time if the court determines that...the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim upon which relief maybe granted; or (iii) seeks monetary relief against a defendant who is immune from such relief.”

¹Refers to court's docket number.

1 screened Plaintiff's complaint, and recommended that certain claims be allowed to proceed, certain
2 claims be dismissed with prejudice, and yet others be dismissed with leave to amend. (*Id.*)

3 Generally, Plaintiff's action stems from an incident that occurred on June 17, 2011, when he
4 had a domestic argument with his wife and his grandson called the Humboldt County Sheriff's
5 Department, which led to the arrival of defendants Landa, Fay, Dove, and eventually Rodgers to
6 Plaintiff's home. (Doc. # 1-1 at 4.) Plaintiff alleged that he waived his hands in the air and told the
7 deputies that he was unarmed; nevertheless, Plaintiff claims that Landa grabbed his wrist, placed
8 handcuffs on him and told him he was going to prison. (*Id.* at 5.) Landa then began to yank and pull on
9 Plaintiff's cuffed right arm. (*Id.*) Plaintiff asserts that defendant Fay then joined in and shot him with
10 a taser gun but Robinson was able to remove the taser darts before they activated; however Fay jumped
11 on Robinson's back and drove him to the ground, at which point Landa, who was still restraining his
12 arm, began kicking him on the left side of his face. (*Id.* at 8.) In the meantime, Plaintiff claims that Fay
13 and Dove were hitting him with their fists and night sticks, and kicking and punching him in the ribs
14 and back of his head. (*Id.*) Defendant Rodgers, another deputy, arrived on the scene later, and according
15 to Plaintiff, did nothing to intervene to stop the force being employed. (*Id.*) Plaintiff claims he was
16 never informed of the charges against him or that he was under arrest (*id.* at 5), and was seventy-two
17 years old at the time (*id.* at 7). He claims that his left eye socket was fractured and that his left eye fell
18 out and had to be re-attached, and this affected his visual acuity. (*Id.* at 7-10.) He also asserts that one
19 of the deputies shot and killed his dog, which caused him emotional distress. (*Id.*)

20 The undersigned concluded that Plaintiff states a Fourth Amendment excessive force claim
21 against Humboldt County Sheriff's Deputies Landa, Fay and Dove in Count One, and therefore, he
22 should be permitted to proceed as to this claim. (Doc. # 3 at 4- 6.) With respect to defendant Rodgers,
23 dismissal without prejudice was recommended, allowing Plaintiff to allege more specific facts
24 concerning Roger's role in the alleged constitutional deprivations. (Doc. # 3 at 10.)

25 The undersigned recommended dismissal with prejudice of Plaintiff's Fifth and Eighth
26 Amendment claims, as well as his Fourteenth Amendment substantive due process claim in Count One.
27 (*Id.* at 6-7.) To the extent Plaintiff was attempting to assert a procedural due process claim in Count
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1 One, it was recommended that the claim should be dismissed with leave to amend so that Plaintiff could
2 allege specific facts to show that the State's post-seizure remedies, or remedies conferred by the
3 common law, were insufficient or unavailable. (*Id.* at 8-9.)

4 Count Two asserts the State law claims of assault and battery in violation of Nevada Revised
5 Statute 200.481(1)(a). (Doc. # 1-1 at 11.) It was recommended that supplemental jurisdiction be
6 exercised over these claims and that they be allowed to proceed. (Doc. # 3.)

7 It was further recommended that Plaintiff be given thirty days from the date of the district
8 judge's order adopting the report and recommendation to file an amended complaint. (Doc. # 3 at 12.)

9 **B. Plaintiff Files his Amended Complaint, the District Judge Adopts the Report &**
10 **Recommendation, and Plaintiff files a Request for a Status Check**

11 On November 29, 2012, prior to the district judge issuing an order concerning the report and
12 recommendation, Plaintiff filed his Amended Complaint. (Doc. # 4.) United States District Court Judge
13 Larry R. Hicks subsequently entered an order adopting and accepting the report and recommendation
14 on January 9, 2013. (Doc. # 5.) The order directed that the original complaint be filed, allowed the
15 complaint to proceed and permitted amendment as recommended within thirty days. (*Id.*)

16 On April 16, 2013, the case was then reassigned to United States District Judge Miranda M. Du.
17 (Doc. # 7.)

18 Likely because the Amended Complaint was filed before the original complaint was actually
19 filed, the Amended Complaint was not immediately screened.

20 Preliminarily, the court apologizes to Plaintiff for the delay in proceeding with a screening of
21 the Amended Complaint which appears to be due to the procedural anomaly outlined above, and thanks
22 Plaintiff for his diligence in bringing this matter to the court's attention through his motion for a status
23 check. The court will now proceed with screening Plaintiff's Amended Complaint.

24 **II. SCREENING OF PLAINTIFF'S AMENDED COMPLAINT**

25 The court will now screen Plaintiff's Amended Complaint pursuant to 28 U.S.C. § 1915. The
26 standard under which the court screens the pleading is set forth in detail in the court's report and
27 recommendation screening Plaintiff's original complaint. (*See* Doc. # 3.)

1 Plaintiff's Amended Complaint, like the original complaint, contains two counts. (Doc. # 4.)
2 Count One contains a claim under the Fourth Amendment related to the alleged use of excessive force
3 by the Humboldt County Sheriff's Deputies who arrived at his home following a call made by his
4 grandson concerning a domestic dispute. (*Id.*) This claim is predicated on the same facts as were
5 asserted in the original complaint, outlined above, with some additional averments as to defendant
6 Rodgers. Plaintiff has omitted any reference in the amended complaint to the Fifth, Eighth, and
7 Fourteenth Amendment claims that were dismissed with prejudice on screening. To the extent he was
8 given leave to amend to assert a procedural due process claim, he does not include those allegations in
9 the Amended Complaint; therefore, the court concludes that claim was not carried forward to the
10 Amended Complaint. As it did in the original complaint, Count Two contains Plaintiff's state law
11 claims for assault and battery in violation of Nevada Revised Statute 200.481(1)(a). The court has
12 already indicated it exercises supplemental jurisdiction over those claims and they are allowed to
13 proceed.

14 Since the court already determined that the Fourth Amendment claim in Count One and State
15 law claims in Count Two can proceed against defendants Landa, Fay and Dove, it is only tasked with
16 screening the claims in Counts One and Two as to defendant Rodgers. In his Amended Complaint,
17 Plaintiff alleges that while the other defendants were beating him, defendant Rodgers arrived and saw
18 their conduct, yet did nothing to intervene, nor did he report the incident. (Doc. # 4 at 8.) He further
19 alleges that defendant Rodgers heard him screaming and pleading for help, but only said "I'm outta
20 here" as he "turned with a smile and walked away." (*Id.* at 9.)

21 "The [non-participating officer] may be held liable only if [he or she] personally deprived [the
22 plaintiff] of a constitutional right by failing to perform an act which they were legally required to do
23 which was the cause in fact of the [plaintiff's] injuries." *Ting v. U.S.*, 927 F.2d 1504, 1511 (9th Cir.
24 1991) (citation omitted) (concluding, however, that onlooking officers were not liable when they did
25 not know force would be used and were physically incapable of preventing the incident). "[W]hile state
26 officials are generally under no constitutional duty to protect members of the public at large from harm
27 from third parties, 'such a duty may arise by virtue of a "special relationship" between state officials

1 and a particular member of the public.” *Id.* (citation omitted). “A ‘special relationship’ exists where
2 the state has created or assumed a custodial relationship with the plaintiff.” *Id.* (citation omitted).

3 District courts within the Ninth Circuit, as well as other circuits have held that a law
4 enforcement officer may be subject to liability under 42 U.S.C. section 1983 if he or she fails to
5 intervene when confronted with the use of excessive force when he or she had a reasonable opportunity
6 to do so. *See, e.g., Broadwater v. Fow*, --- F.Supp.2d---, Civil Action No. 1:12-CV-1937, 2013 WL
7 2038806, at * (M.D. Pa. May 14, 2013) (citing *Smith v. Mensinger*, 293 F.3d 641, 650-52 (3d Cir.
8 2002); *Baker v. Monroe Twp.*, 50 F.3d 1186 (3d Cir. 1995)) (“Regardless of ...supervisory status, a law
9 enforcement officer may be liable under § 1983 if he fails to intervene in the improper use of force
10 when he has a reasonable opportunity to do so.” Finding that plaintiff successfully alleged a claim
11 against officers who witnessed other officers beating plaintiff and did not attempt to intervene or stop
12 the conduct); *Ramirez-Lliveras v. Pagan-Cruz*, 833 F.Supp.2d 151, 163 (D. PR 2011) (quoting *Igartua*
13 *v. Muniz Estrada*, No. 10-1891, 2011 WL 3652616, at * 4 (D.PR Aug. 18, 2011) (quoting *Gaudreault*
14 *v. Munic. of Salem, Mass*, 923 F.2d 203, 207 n. 3 (1st Cir. 1990))) (“To state a claim for failure to
15 intervene under section 1983, [a plaintiff] must plead that ‘[a]n officer who is present on the
16 scene...fails to take reasonable steps to protect the victim of another officer’s use of excessive
17 force.’...Nevertheless, an officer is not liable if the officer did not have the opportunity to prevent the
18 use of force.”); *Thompson v. Boggs*, 33 F.3d 847, 857 (7th Cir. 1994), *cert. denied*, 514 U.S. 1063
19 (1995); *Mick v. Brewer*, 76 F.3d 1127, 1136 (10th Cir. 1996) (“a law enforcement official who fails
20 to intervene to prevent another law enforcement official’s use of excessive force may be liable under
21 § 1983.”).

22 The court concludes that Plaintiff has sufficiently stated a claim against defendant Rodgers
23 under the Fourth Amendment based on his alleged failure to act or intervene as the remaining
24 defendants were allegedly inflicting excessive force upon Plaintiff. Plaintiff has alleged facts that when
25 construed in his favor assert that he was in custody of the other defendants, who were unnecessarily
26 beating him, that defendant Rodgers had a reasonable opportunity to intervene, but failed to do so. In
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1 contrast to *Ting*, where the Ninth Circuit concluded that the non-shooting officer did not have an
2 opportunity to intervene, Plaintiff's allegations indicate that defendant Rodgers did have an opportunity
3 to intervene because according to Plaintiff, he arrived as the other defendants were beating Plaintiff,
4 and even when Plaintiff screamed to him for help, he turned and walked away.

5 Therefore, Plaintiff 's Amended Complaint may proceed as to his Fourth Amendment claim
6 against defendants Landa, Fay, Dove, and Rodgers, as well as his corresponding State law claims in
7 Count II.

8 III. CONCLUSION

9 1. Plaintiff's motion for a status check (Doc. # 8) is **GRANTED**. Plaintiff's amended complaint
10 (Doc. # 4) may **PROCEED** only on the Fourth Amendment unreasonable seizure (excessive force)
11 claim in Count I as to defendants Landa, Fay, Dove, and Rodgers in Count One and the supplemental
12 State law claims of assault and battery in Count Two as to defendants Landa, Fay, Dove and Rodgers;

13 2. The Clerk shall **ISSUE** summons to the defendants and deliver the same to the U.S. Marshal
14 for service. The Clerk shall **SEND** Plaintiff sufficient copies of the complaint and service of process
15 forms (USM-285) for each defendant. Plaintiff should be given twenty days in which to furnish the U.S.
16 Marshal the required forms. Within twenty days after receiving from the U.S. Marshal a copy of the
17 USM-285 form showing whether service has been accomplished, Plaintiff must file a notice with the
18 court identifying the name of the unserved defendant(s) and specifying a more detailed name and/or
19 address for said defendant(s), or whether some other manner of service should be attempted. Plaintiff
20 is reminded that pursuant to Rule 4(m) of the Federal Rules of Civil Procedure, service must be
21 accomplished within 120 days of the date of this order.

22 3. Henceforth, Plaintiff shall serve upon the defendants or, if appearance has been entered by
23 counsel, upon the attorney(s) a copy of every pleading, motion or other document submitted for
24 consideration by the court. Plaintiff shall include with the original paper to be filed with the clerk of
25 the court a certificate stating the date that a true and correct copy of the document was mailed to the
26 defendants or counsel for defendants. The court may disregard any paper received by a district judge
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1 or a magistrate judge which has not been filed with the clerk of the court, and any paper received by
2 a district judge, magistrate judge or clerk of the court which fails to include a certificate of service.

3 **IT IS SO ORDERED.**

4 DATED: August 15, 2013.

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6 WILLIAM G. COBB
7 UNITED STATES MAGISTRATE JUDGE
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